No. 87-271

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,

Petitioner,

vs.

EUGENE F. BRIECK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff in an action brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 et seq., may survive an employer's motion for summary judgment by producing evidence that the employer's proferred reasons are unworthy of credence?

PARTIES TO THE PROCEEDING

Petitioner:
Harbison-Walker Refractories, A Division
of Dresser Industries, Inc.

Respondent
Eugene F. Brieck

Amicus Curiae:
American Association of Retired Persons

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, respectfully submits this brief *amicus curiae* in support of the Respondent. The written consents of all parties have been filed with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Association of Retired Persons, "AARP", is a not-for-profit membership corporation of more than 29 million

persons age 50 and older. AARP is the largest organized group of older Americans in the country.[1] Approximately eight million AARP members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, "ADEA", 29 U.S.C. § 621 *et seq.*

In keeping with its purposes, AARP is working to alleviate age discrimination in employment as well as other aspects of life. AARP has instituted a major campaign to improve the employment opportunities available to older workers. The overall objectives of the AARP "Worker Equity Initiative" are to assess the impact of an aging work force on society; eliminate stereotypes of older workers; assist employers in creating work place opportunities for older workers; and help older persons make informed employment and retirement decisions.

The Worker Equity Initiative seeks to eliminate age discrimination in the work force through legislative, administrative and judicial action, including participation in federal court litigation under the ADEA. Since March 1985, AARP has filed numerous *amicus curiae* briefs in the United States Circuit Courts of Appeal on issues of concern to its working members, and in three instances instituted litigation to protect the rights of its members under the ADEA.[2] AARP also participated as *amicus curiae* in this Court's consideration of two ADEA cases. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985).

The issues presented by this appeal directly affect older workers' right to a jury trial of their age discrimination claims. The Third

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[1] In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons, (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force.

[2] *AARP v. EEOC*, 655 F. Supp. 228 (D.D.C.), *rev'd in part*, 823 F.2d 600 (D.C. Cir. 1987); *AARP v. E.I. DuPont de Nemours & Co*, No. 86-6866 (E.D. Pa. filed Nov. 21, 1986); *AARP v. Farmers Group, Inc.*, No. 86-6203 (C.D. Cal. filed Sept. 23, 1986).

Circuit's decision preserved that right in holding that an ADEA plaintiff can withstand summary judgment by presenting evidence "that the employer's proffered explanation is unworthy of credence" in accordance with the standard enunciated in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). This standard properly precludes summary judgment against victims of age discrimination even if they have not presented "any evidence that age was a determining factor in the employer's motivation." *Oxman v. WLS-TV*, 846 F.2d 448, 46 Fair Empl. Prac. [BNA] Cas. 1392, 1395 (7th Cir. 1988), quoting *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409-10 (7th Cir. 1984). It insures that older workers will have their day in court despite the unavailability of direct evidence. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

The standard for summary judgment set forth by the court below also accords victims of age discrimination the same treatment as victims of race or sex discrimination under Title VII of the Civil Rights Act of 1964,[3] as established by *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court has recognized the close relationship between Title VII and the ADEA which share the common purpose of eradicating discrimination and contain prohibitions that are *in haec verba*. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). In this instance, age discrimination plaintiffs should therefore be subject to the same standard of proof as Title VII plaintiffs, who can not only withstand summary judgment but can prevail under *Burdine's* "unworthy of credence" standard.

STATEMENT OF THE CASE

Eugene Brieck (Respondent) joined Harbison-Walker Refractories (Petitioner) in 1965 and worked for seventeen years as a brick installation specialist. J.A. 59. In July 1982, during a reduction-in-force, Brieck was laid off at age 55 along with another installation specialist who was 59 years old. J.A. 33. About one month later, Harbison-Walker laid off another installation specialist, E.G. Malarich, age 59, while retaining a 39 year old installation specialist, Hugh Faust, until November 1982 when he was laid off. J.A. 33.

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[3] 42 U.S.C. § 2000e *et seq.*

The 39 year old Faust was the only installation specialist to be recalled by Harbison-Walker. J.A. 15.

Brieck sued, claiming that Harbison-Walker's decision to terminate him and to recall a younger worker violated the ADEA. Upon Petitioner's motion, the U.S. District Court for the Western District of Pennsylvania granted summary judgment for Harbison-Walker. Although the district court found that Brieck had established a prima facie case of discrimination, P.A. 15a, the district court determined that Harbison-Walker presented a legitimate, nondiscriminatory reason for firing Brieck and retaining Faust. P.A. 16a. The district court reasoned that Brieck was required to present evidence of pretext showing that his age was a determining factor in the lay-off decision. P.A. 17a. Concluding that the evidence presented did not meet this burden, the district court awarded summary judgment to Harbison-Walker.[4]

Reversing the district court, the Third Circuit Court of Appeals held that the district court erred in requiring Brieck to "establish a direct inference that the employer discharged him because of his age." P.A. 2a. Rather, the Third Circuit emphasized that the proper standard permits an ADEA plaintiff to satisfy its burden of opposing summary judgment by introducing evidence that could support an inference of discrimination. *Id.* Specifically, the Third Circuit held that evidence challenging the credibility of the employer's proffered reason was sufficient to raise an inference that the employer did not act for nondiscriminatory reasons. *Id.* Finding such evidence present in this case, the Third Circuit held summary judgment was improper because a genuine issue of material fact existed. P.A. 5a.

SUMMARY OF ARGUMENT

The standard for determining the appropriateness of summary judgment set forth by the Third Circuit adheres to the framework established by this Court for proving employment discrimination.

[4] The district court also rejected Brieck's claims for breach of contract and the tortious infliction of emotional distress which are not in issue here. P.A. 17a – 20a.

See McDonnell Douglas Corp. v. Green, *supra*. In *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256, this Court expressly held that a plaintiff may establish discrimination by direct evidence of discriminatory motive *or* by indirect evidence "that the employer's proffered explanation is unworthy of credence." (Emphasis added). Based on this premise, the Third Circuit properly held that an ADEA plaintiff may withstand summary judgment by presenting evidence that reveals inconsistencies and implausibilities in the employer's asserted reason. P.A. 2a. The Court of Appeals rejected the district court's holding that a plaintiff is required to present age-related evidence of discriminatory intent to show that the employer's reasons were pretextual. This analysis is not only consistent with the standard applied under Title VII by this Court,[5] it is supported by the holdings of several other circuit courts in ADEA cases.[6]

The decision below simply applied these well-established principles of proof to the determination of summary judgment, consistent with this Court's recent analysis of Fed. R. Civ. P. 56. *See Anderson v. Liberty Lobby*, 477 U.S. 317, 106 S. Ct. 2505 (1986). The Court of Appeals held that evidence challenging the credibility of the employer's proffered explanation could reasonably support an inference that the employer did not act for nondiscriminatory reasons. P.A. 2a. Because a jury could draw the inference that the employer's reasons were pretextual, the Third Circuit correctly held that summary judgment was inappropriate. *See Perez v. Curcio*, 841 F.2d at 258. Since the Third Circuit properly applied the principles governing summary judgment as well as the substantive law, this Court should affirm the decision below.

[5] *See Aikens*, 460 U.S. at 716, 718; *Burdine*, 450 U.S. at 256.

[6] *See Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), *cert. dismissed by stipulation*, 108 S. Ct. 26 (1987); *Oxman v. WLS-TV*, *supra*; *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314 (7th Cir. 1987); *Perez v. Curcio*, 841 F.2d 255 (9th Cir. 1988); *Castle v. Sangamo Weston., Inc.*, 837 F.2d 1550 (11th Cir. 1988); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987).

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT SUMMARY JUDGMENT WAS IMPROPER WHERE A GENUINE ISSUE EXISTED CONCERNING THE EMPLOYER'S PROFFERED EXPLANATION.

The issue before this Court is the proper standard to be applied in determining a plaintiff's burden in meeting a summary judgment challenge in an ADEA case.[7] As this Court held in *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2510, the substantive law determines which facts are material. To determine whether the Respondent's evidence was material and sufficient to withstand summary judgment, the Third Circuit applied the framework of *United States Postal Service Board of Governors v. Aikens*, 400 U.S. at 716, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256, which established that a plaintiff can prevail on his discrimination claim by presenting "indirect evidence that the employer's proffered reason is unworthy of credence." Reasoning that a plaintiff could prevail by such proof, the Court of Appeals held that summary judgment was improper where an ADEA plaintiff presented evidence discrediting the employer's proffered business explanation. Finding that the plaintiff's evidence sufficiently attacked the credibility of the employer's reason, the court concluded that plaintiff raised a genuine issue of material fact regarding the employer's intent which precluded summary judgment. P.A. 2a.[8]

The Third Circuit's standard for determining whether summary judgment was proper is consistent with the standards recognized by this Court. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2551 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2505. Rule 56 of the Federal Rules of Civil Procedure requires the moving party to show his entitlement to judgment as a matter of law and demonstrate that no genuine issue of material fact exists.

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[7] AARP, as *amicus curiae*, limits its discussion to the legal principles at issue.

[8] The Third Circuit's decision below relies heavily on one of its earlier decisions which contains a more extensive analysis of the appropriate standards and types of proof. *See Chipollini, supra.*

Fed. R. Civ. P. 56(C). The nonmoving party who bears the burden of proof at trial is not required to establish at the summary judgment stage that he will ultimately prevail on his claim. *See First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289 (1968). Rather, the record must contain evidence sufficient to establish only the existence of a triable issue. The nonmovant's evidence need not establish the ultimate issue. Conversely, the party seeking summary judgment must demonstrate the absence of evidence from which a trier of fact could find for the party opposing summary judgment on the merits. *Anderson*, 106 S. Ct. at 2510.

Inferences play a significant role at the summary judgment stage, particularly in discrimination cases. Where conflicting inferences arise from the evidence presented, the nonmoving party must receive the benefit of those inferences as the court is obliged to construe the facts in the light most favorable to the party opposing summary judgment. *Anderson*, 106 S. Ct. at 2513. The court may not weigh the evidence or pass judgment on the credibility of witnesses, *id.*, since that is the role for the trier of fact. *See Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1497 (11th Cir. 1987).[9]

As this Court has observed, employment discrimination cases raise difficult issues involving inferences of intent and motive that are critical to the ultimate issue in the case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716. The employer's intent at the time of an employee's termination is an essential factual question, *see Chipollini*, 814 F.2d at 900. This cautions against the increasing use of summary judgment in employment discrimination cases. *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363, 364 (8th Cir. 1988), *petition for cert. filed*, (Feb. 16, 1988); *Perez v. Curcio, supra*. When a plaintiff presents evidence discrediting an employer's stated reason, which is the manifestation of the employer's intent, the plaintiff raises an issue of material

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[9] Although *Rosenfield* involved review of the standard applicable to judgment notwithstanding the verdict, the standard is similar to that for review of summary judgment or a directed verdict. *Anderson*, 106 S. Ct. at 2512. *See Reynolds v. CLP Corp.*, 812 F.2d 671, 674 (11th Cir. 1987); 9 J. Wigmore on Evidence § 2495 at 391.

fact which must preclude summary judgment. *Chipollini*, 814 F.2d at 899.

In this case, the Petitioner's proffered reason for recalling and retaining a younger worker rather than Respondent was the alleged need for diverse skills. Respondent's evidence that the younger worker who was retained did not use or need diverse skills after the reduction-in-force suggested that the reason articulated by Petitioner was not credible. In a reduction-in-force or layoff situation, this type of evidence is critical in determining whether the employer's reason for retaining the younger worker and terminating the older worker is truly nondiscriminatory.

The Third Circuit properly applied the substantive law in determining that summary judgment was inappropriate given the evidence below. Essential to the Court of Appeals' holding was its finding that the lower court disregarded the type and import of Respondent's evidence in challenging the credibility of Petitioner's proffered reason for the employment decisions in issue. The effect of such evidence is to support an inference that the company acted for a reason — more than likely an impermissible one — other than it proffered. *See Chipollini*, 814 F.2d at 899. Thus, the Third Court properly held that the district court erred in determining whether the employer's reason was plausible. Rather, at the summary judgment stage, the court's inquiry must be limited to "whether there is also evidence of record which, if credited, could render the reason implausible." P.A. 5a-6a. Testing the credibility of the proffered reason must necessarily be left to the jury. *Rosenfield*, 827 F.2d at 1497.

The standard applied by the Third Circuit for reviewing summary judgment in age discrimination cases strikes an appropriate balance between this Court's holdings on summary judgment and proving discrimination. If evidence that the employer's explanation is unworthy of credence may establish the ultimate issue of discrimination, evidence which questions the credibility of the employer's reason should suffice to raise an inference of discrimination. In other words, since such proof entitles the victim of discrimination to prevail, it must similarly permit him to withstand summary judgment.

Petitioner's protestations that the lower court's standard eliminates summary judgment for employers are unfounded. Despite the application of that standard by several circuits, employers continue to overwhelmingly prevail on summary judgment in ADEA cases.[10] While the summary judgment mechanism serves to eliminate cases where there is no genuine issue for trial, summary judgment should not be used as a tool to unfairly deny plaintiffs their day in court. *See Anderson*, 106 S. Ct. at 2514; *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d at 364. The reasoning and holding of the Third Circuit insures the right of ADEA plaintiffs to the jury determination which Congress granted to them.

II. THE COURT BELOW APPLIED THE PROPER STANDARD FOR PROVING AGE DISCRIMINATION.

Under the standards set forth by this Court in *Aikens*, 460 U.S. 711, *Burdine*, 450 U.S. 248, a victim of discrimination may prevail by "indirect evidence that the employer's proffered explanation is unworthy of credence." Relying on this principle, the court below held that evidence attacking the truth or credibility of the employer's reason is clearly material and sufficient to raise a genuine issue precluding summary judgment. P.A. 2a.

The decision below should be affirmed because it properly applied the substantive law principles set forth by this Court to the determination of summary judgment. Moreover, the Third Circuit's application of *Burdine's* standard to ADEA cases is consistent with this Court's recognition of the parallel provisions and goals of Title VII and the ADEA. *See Lorillard v. Pons*, 434 U.S. at 584.

A. In Title VII Cases, This Court Has Repeatedly Confirmed That Pretext May Be Established Solely By Showing that the Employer's Reasons Are Unworthy of Credence.

Given the absence of "smoking gun" evidence in discrimination cases, this Court developed a framework for cases under Title VII

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[10] In survey of reported ADEA cases from 1978 to June 1986, employers prevailed in 142 of 153 summary judgment cases. *See Working Americans: Equality at Any Age, Hearing Before the Senate Special Committee on Aging*, S. Hrg. No. 826, 99th Cong., 2d Sess. 90 (June 19, 1986). In contrast, where ADEA claims went to trial, employers had only a slight edge in prevailing (93 cases) over plaintiffs (90 cases). *Id.* at 91.

whereby plaintiffs could prove discrimination without presenting specific evidence of discriminatory intent. *See McDonnell Douglas Corporation v. Green*, *supra*. The *McDonnell Douglas* framework allows a plaintiff to establish a prima facie case of discriminatory termination by showing that (1) he is in the protected class; (2) he was qualified for the position; (3) he was terminated despite his qualifications; and (4) a younger worker replaced him or was retained.[11] *Burdine*, 450 U.S. at 253. The prima facie case creates a rebuttable presumption that the employer's act was motivated by an impermissible factor. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The effect of the rebuttable presumption on the employer's burden was clarified by the Court in *Burdine*. Once a plaintiff establishes a prima facie case, the employer may rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for the employment decision. *Burdine*, 450 U.S. at 254. If the employer succeeds in its burden of production, the plaintiff must prove that the proffered reason is merely a pretext for discrimination. *Id.* at 256.

Questions regarding the employer's intent fall under the determination of pretext. *Chipollini*, 814 F.2d at 898. In *Burdine*, the Court expressly held that a plaintiff can establish pretext in one of two ways. 450 U.S. at 256. A plaintiff may establish pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer." *Id. Accord Aikens*, 460 U.S. at 717-718 (Blackmun, J. concurring). In the alternative, a plaintiff may prove pretext "*indirectly by showing that the employer's proffered explanation is unworthy of credence.*" *Burdine*, 450 U.S. at 256 (emphasis added).

The court below scrupulously followed the standards set forth in *McDonnell Douglas*, *Burdine*, and *Aikens* in holding that evidence challenging the credibility of the employer's reason to show

[11] The fourth element of the *McDonnel Douglas* test has been modified for reduction-in-force cases in which the plaintiff is generally not replaced by a younger worker. *Oxman v. WLS-TV*, *supra*.

that it was false constitutes proof of pretext. Yet Petitioner urges the Court to retreat from this settled method of proving employment discrimination. Petitioner would limit proof of pretext to age-related evidence and would require victims of discrimination to produce *additional* evidence at the pretext stage. Petitioner's suggestions are contrary to the purposes of the *McDonnell Douglas* framework and have already been rejected by this Court in *Aikens*.

The *McDonnell Douglas* framework serves important purposes in proving employment discrimination. First, it allows plaintiffs to prevail without direct evidence which is generally unavailable in discrimination cases. *See Teamsters v. United States*, 431 U.S. 324, 358, n. 44 (1977). The prima facie case raises a presumption of discrimination because it eliminates the most common legitimate reasons for the employment action. *Furnco Construction Corp. v. Waters*, 438 U.S. at 577. If a plaintiff establishes a prima facie case which the employer fails to rebut, the plaintiff is entitled to prevail. *Burdine*, 450 U.S. at 245. The reason the plaintiff prevails at the point is because the *McDonnell Douglas/Burdine* framework allows the trier of fact to infer that the employment decision was based on discriminatory reasons.

Where the employer produces a legitimate, nondiscriminatory reason for its decision, the mandatory presumption created by the *McDonnell Douglas/Burdine* test drops from the case. *Aikens*, 460 U.S. at 715. However, a plaintiff need not present additional evidence or direct evidence of discriminatory intent to prove pretext as Petitioner argues, *Aikens*, 460 U.S. at 715, 717, because the prima facie case already tied the evidence and inferences to age-based animus.

The *McDonnell Douglas* framework was not designed to have courts ignore the evidence and inferences raised by the plaintiff's prima facie case once the employer articulates a legitimate business reason. *Burdine*, 450 U.S. at 255, n. 10. While the presumption may be dispelled, the evidence and inferences from the plaintiff's initial showing remain and may be considered with all of the evidence as the court decides the ultimate factual issue. *Aikens*, 460 U.S. at 715. As this Court recognized in *Burdine*, "there may be some cases where the plaintiff's initial evidence, combined with

effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine*, 450 U.S. at 255, n. 10.

Indeed, if a plaintiff presents evidence discrediting the employer's proffered explanation, the inference of discrimination should be stronger than if the employer had produced no explanation since the plaintiff has gone beyond his prima facie showing. Such evidence suggests that the employer has something to hide. The "unworthy of credence" standard established by this Court means that neither direct evidence nor indirect evidence specifically limited to age-based animus is required to show pretext. Rather, the trier of fact may resolve the ultimate issue by "decid[ing] which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716.

Aikens and *Burdine* clearly reject Petitioner's contention that a plaintiff must do more than present evidence that the employer's proffered reason is unworthy of credence. In arguing that ADEA plaintiffs must present age-related evidence of pretext to withstand summary judgment, Petitioner essentially asks the Court to retreat from the accepted meaning of *Burdine*. The Court should decline that invitation and instead reaffirm the balanced and practical approach set forth in *Burdine* and *Aikens*.

B. Age Discrimination Claims are Subject to the Same Principles and Method of Proof as Claims Under Title VII.

Finding age discrimination in our society to be pervasive, Congress enacted the ADEA in 1967 to prohibit arbitrary discrimination based on age in employment. *See* 29 U.S.C. § 621(a). While the problem may be pervasive, the courts have repeatedly recognized that age discrimination may be subtle. *Castle v. Sangamo Weston, Inc.*, 837 F.2d at 1559; *LaMontagne*, 750 F.2d at 1410. Direct evidence of discrimination is generally unavailable to the ADEA plaintiff or is difficult to find. *Id. See Chipollini*, 814 F.2d at 899; *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984). As a result, many victims of age discrimination are unable to produce direct or circumstantial evidence that age was a determining factor in the employment decision. *Oxman v. WLS-TV*, 46 Fair Empl. Prac. at 1395.

A majority of the circuit courts have applied the Title VII framework of proof to ADEA cases recognizing that the method of proof serves similar purposes under both statutes.[12] To otherwise require direct evidence of age discrimination in the employment decision would make it virtually impossible to prove an ADEA claim. "Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age'; or to inform a dismissed employee candidly that he is too old for the job." *Thornbrough*, 760 F.2d at 638. The *McDonnell Douglas/Burdine* standard serves to create the inference that age was a determining factor in the employer's decision. *Oxman v. WLS-TC*, 46 Fair Empl. Prac. at 1397. Thus, the indirect method of proof allows victims of discrimination to prevail without presenting *any* age-related evidence independent of the requirements of the prima facie case. *LaMontagne*, 750 F.2d at 1409-10 (emphasis in original).

The standard for summary judgment in an ADEA case articulated by the Third Circuit requires no more or no less than the same standards under which victims of discrimination based on race or sex may prevail on their claims. *See Aikens*, 460 U.S. 711; *Burdine*, 450 U.S. 248; *McDonnell Douglas*, 411 U.S. 792. Petitioner's arguments would impose a greater standard of proof on the victim of age discrimination opposing summary judgment than is required of the race discrimination victim to prevail overall. A requirement that an ADEA plaintiff's claim would fail without direct evidence, or indirect evidence specifically related to age as Petitioner argues, would overturn settled civil rights law and would undermine the purposes of the ADEA. In light of the common objectives of the ADEA and Title VII[13] and the importance of the

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[12] *See Castle v. Sangamo Weston, Inc.*, 837 F.2d at 1559 (11th Cir.); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 n.1 (10th Cir. 1988); *Russo v. Trifari, Kaussman & Fishel, Inc.*, 837 F.2d 40, 43 (2d Cir. 1988); *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314, 1318 (7th Cir. 1988); *Perez v. Curcio*, 841 F.2d at 257 (9th Cir.); *Chipollini* 814 F.2d at 896-98 (3d Cir.); *Sims v. Cleland*, 813 F.2d 790, 792 (6th Cir. 1987); *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 639 (5th Cir. 1985).

[13] *See Lorillard v. Pons*, 434 U.S. at 584.

McDonnell Douglas framework to proving violations of either statute, this Court should confirm the application of the indirect method of proof to ADEA cases.

The standard applied by the Third Circuit is not only in accordance with this Court's holdings under Title VII, it is consistent with the decisions of several other circuit courts contrary to Petitioner's suggestion of a conflict in the circuits[14] or that the decision below radically departs from established precedent. In addition to the Third Circuit,[15] the Seventh,[16] Ninth[17] and Eleventh[18] Circuits have explicitly held that an ADEA plaintiff may withstand summary judgment by presenting evidence that the employer's proffered explanation is "unworthy of credence". Following this Court's analysis under *Burdine*, these circuits recognize that the indirect method of proof permits a plaintiff to prevail by producing evidence challenging the truth of the employer's reason.[19] Moreover, these cases support the holding that a plaintiff need not produce age-related evidence of pretext to withstand summary judgment. *See also Rosenfield*, 827 F.2d at 1496. (Evidence discrediting the employer's proffered explanation established pretext). As the Ninth Circuit recently observed.

> As long as [Plaintiff] introduced some evidence from which a jury could believe [Plaintiff's] explanation rather than the [employer's] explanation and material questions of fact exist, the case must go to a jury.

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[14] The only decision that is arguably in direct conflict with the decision below is *White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984), *cert. denied*, 469 U.S. 933 (1984). *White* is inapposite to the meaning and application of *Aikens* and *Burdine* and should be rejected by this Court.

[15] *Sorba v. Pennsylvania Drilling Co., supra.; Chipollini, supra.*

[16] *Oxman v. WLS-TC, supra; Ayala v. Mayfair Molded Products Corp., supra.*

[17] *Perez v. Curcio, supra.*

[18] *Castle v. Sangamo Weston, Inc., supra; Rollins v. TechSouth, Inc., supra.*

[19] Other courts have also applied the *Burdine* "unworthy of credence" standard without extensive comment. *See Sims v. Cleland*, 813 F.2d at 792.

Perez v. Curcio, 841 F.2d at 258.

The question here is not whether Respondent proved pretext, but rather whether the plaintiff raised a genuine issue of material fact regarding pretext. *See Thornbrough*, 760 F.2d at 646. The Third Circuit simply articulated in a clear and straightforward manner the substantive law on the question of pretext which the courts have been applying to Title VII and ADEA cases since *Burdine*. No reason suggests the need to diverge from that course.

CONCLUSION

For the foregoing reasons, the American Association of Retired Persons respectfully urges the Court to affirm the decision of the Third Circuit below.

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